Supreme Court, U. S.
FILED
JAN 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

## No. 79-972

WESTVACO CORP., et al.,

*Petitioners,*

*vs.*

ADAMS EXTRACT CO., et al.,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

R. CLIFFORD POTTER
BELL, BOYD, LLOYD, HADDAD & BURNS
135 South LaSalle Street
Chicago, Illinois 60603
(312) 372-1121
*Counsel for* Boise Cascade Corporation
*and Also on Behalf of the Following Defendant-Respondents:*

The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.
Diamond International Corporation
Dura-Containers, Inc.
Green Bay Packaging, Inc.
Inland Container Corporation
International Paper Company
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
Olinkraft, Inc.
Owens-Illinois, Inc.
St. Joe Paper Company
St. Regis Paper Company
Union Camp Corporation
U. S. Corrugated Fibre-Box Company

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Table of Cases and Authorities | ii |
| Questions Presented | 1 |
| Statement of the Case | 2 |
| Reasons for Denying the Writ | 5 |
| 1. Congress Is the Appropriate Forum for Determining Whether to Create a New Cause of Action for Contribution | 5 |
| 2. Since Congress Is Currently Considering the Merits of Contribution in Antitrust Cases, the Petition Should Be Denied | 11 |
| 3. No Conflict Exists Among the Courts of Appeals Which Would Warrant Granting Certiorari at This Time | 12 |
| Conclusion | 15 |
| Appendices | A-1 |

## TABLE OF CASES AND AUTHORITIES.

### *1. Cases*

Wilson P. Abraham Construction Corp. v. Texas Industries, Inc., No. 75-2820 (E. D. La. 1977), *aff'd*, 604 F. 2d 897, *en banc rehng. denied*, 608 F. 2d 524 (5th Cir. 1979) ..... 3, 6, 9, 10,12, 13, 14

Alabama v. Blue Bird Body Co., No. 75-23-N (M. D. Ala. June 22, 1979), *appeal docketed*, No. 79-2667 (5th Cir. July 26, 1979) ..... 6, 14

In re Ampicillin Antitrust Litigation, 82 F. R. D. 647 (D. D. C. 1979) ..... 6

In re Beef Industry Antitrust Litigation, M. D. L. No. 248 N. D. Tex. Sept. 1, 1978), *aff'd*, 1980-1 Trade Cas. ¶ 63,021, *en banc rehng. denied*, (5th Cir. Dec. 21, 1979) ..... 6, 9

Chevron Oil v. Huson, 404 U. S. 97 (1971) ..... 12

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U. S. 106 (1974) ..... 7

In re Corrugated Container Antitrust Litigation, 1979-1 Trade Cas. ¶ 62,689 (S. D. Tex.), *aff'd per curiam*, No. 79-2439, *pet. for rehng. and suggestion for rehng. en banc pending*, (5th Cir. 1979) ..... 6, 12

Edmonds v. Compagnie General Transatlantique, 99 S. Ct. 2753, *rehng. denied*, 100 S. Ct. 194 (1979) ..... 7

El Camino Glass v. Sunglo Glass Co., 1977-1 Trade Cas. ¶ 61,533 (N. D. Cal. 1976) ..... 6

In re Fine Paper Antitrust Litigation, M. D. L. No. 323 (E. D. Pa. Aug. 3, 1979) ..... 6, 14

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282 (1952) ..... 7

Hedges Enterprises v. Continental Group, Inc., 1979-1 Trade Cas. ¶ 62,717 (E. D. Pa. 1979) ..... 6

Heizer Corp. v. Ross, 601 F. 2d 330 (7th Cir. 1979) .... 13

Illinois Brick Co. v. Illinois, 431 U. S. 720 (1977) ..... 8

Labbee v. Wm. Wrigley & Co., No. 4029 (W. D. Wash. Dec. 20, 1974) ..... 6

Little Rock School Dist. v. Borden, Inc., 1980-1 Trade Cas. ¶ 63,059 (E. D. Ark. 1979) ..... 15

Olson Farms, Inc. v. Safeway Stores, Inc., 1977-2 Trade Cas. ¶ 61,698 (D. Utah), *aff'd*, 1979-2 Trade Cas. ¶ 62,995, *en banc rehng. granted*, (10th Cir. Dec. 27, 1979) ..... 6, 10, 12, 13

Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F. 2d 1179 (8th Cir. 1979), *en banc rehng. denied* (8th Cir. April 17, 1979) ..... 6, 11, 12, 13, 14, 15

Reiter v. Sonotone Corp., 99 S. Ct. 2326 (1979) ..... 8, 9

Sabre Shipping Corp. v. American President Lines, Ltd., 298 F. Supp. 1339 (S. D. N. Y. 1969) ..... 6, 10

Transamerica Mortgage Advisors, Inc. v. Lewis, 48 U. S. L. W. 4001 (Nov. 13, 1979) ..... 8

Weinberg v. Mitchell, 588 F. 2d 275 (9th Cir. 1978) .... 12

*2. Statutes and Rules*

Antitrust Equal Enforcement Act of 1979, S. 1468, 96th Cong., 1st Sess., Rept. No. 96-428 (Nov. 15, 1979) ..... 9, 11, 12

Clayton Antitrust Act § 4, 16, 15 U. S. C. § 16, 26 (1976) ..... 6, 8

Fed. R. Civ. P. 54(b) ..... 3

Hearings on S. 1468 Before the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary, 96th Cong., 1st Sess., 42-43 (1979) .. 9

Securities Act of 1933, § 11(f), 15 U. S. C. § 77k(f) (1972) ..... 10

Securities and Exchange Act of 1934, §§ 9(e), 18(b), 15 U. S. C. §§ 78i(e), 78r(b) (1977) ..... 10

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

---

**No. 79-972**

---

WESTVACO CORP., et al.,

*Petitioners,*

*vs.*

ADAMS EXTRACT CO., et al.,

*Respondents.*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

The undersigned defendant-respondents respectfully request this Court to deny the petition for a writ of certiorari to review the judgment, entered on October 30, 1979, of the United States Court of Appeals for the Fifth Circuit.

### QUESTIONS PRESENTED

1. Should this Court create a new cause of action for contribution in antitrust cases when existing legislation does not provide for any such cause of action?

2. Is a new cause of action for contribution necessary or desirable in antitrust cases?

3. Should contribution be permitted against settling defendants in antitrust cases, thereby subjecting them to continuing treble damage exposure in the settled cases?

4. Should defendant-respondents be subject to contribution under the circumstances of this litigation even if such a new cause of action were created at this time?

## STATEMENT OF THE CASE

Defendant-respondents and petitioners are named as defendants in most of the more than sixty treble damage antitrust actions which have been consolidated in Houston, Texas, as *In re Corrugated Container Antitrust Litigation* ("MDL-310"). The twenty-nine defendant-respondents to this petition[1] have settled the consolidated class actions for the unprecedented sum of over $300 million in order to avoid the expenses of preparing for and participating in a trial of these tremendously complicated class actions and to eliminate the uncertainties of such a trial, including the risk of an erroneous verdict awarding plaintiffs substantial damages. *See, e.g.*, Boise Cascade Corp. Settlement Agreement, at 2 (Record ("R") Vol. II at 151).

Petitioners have never contended these settlements were inadequate. Indeed, petitioners agree that defendant-respondents entered into their huge settlements in order to avoid the risk of a substantial monetary judgment in these antitrust class actions.[2] *E.g.*, Petition, at pp. 3-4. Although they also

1. Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Petition"). While only twenty-seven defendant-respondents are listed in Appendix A to the petition, at least two other defendants, Interstate Container Corp. ("Interstate") and Southwest Forest Industries, Inc. ("Southwest Forest"), have recently settled class actions involved in this petition, would be cross-defendants if the dismissed contribution claims were reinstated, and therefore have a substantial interest in the outcome of this appeal.

2. While substantial damages are claimed, the $5.9 billion figure cited by petitioners is by far the most extreme contention advanced as to the possible amount recoverable by the class. This "estimate" was advanced by a handful of plaintiffs' attorneys in an effort to oppose approval of the record $300 million settlements. Objections of Certain Active and Reserve Class Representatives to Preliminary Approval of the Proposed Settlements (R. Vol. I, Docket Entry No. 645), at 27. The vast majority of plaintiffs' counsel placed the value of this case for settlement purposes, *prior to the verdicts of acquittal in the criminal cases, which were based upon the same allegations as in plaintiffs' complaints,* at between $100 million and $300 million. Memorandum of Class Plaintiffs in Support of Their Motion for Preliminary Approval of All Settlements (R. Vol. I, Docket Entry No. 591), at 9. The verdicts should have reduced the attorneys' earlier estimates.

could have settled the class litigation, petitioners determined that they would risk the exposure of a substantial judgment and the expenses of trial rather than pay the settlement amounts sought by plaintiffs.[3]

In light of their continuing possible exposure to damages in excess of the settlement amounts paid, petitioners asserted contribution claims against defendant-respondents. Settling defendants and plaintiffs moved to dismiss these claims with prejudice. On May 30, 1979, the district court dismissed petitioners' contribution claims pursuant to Rule 54(b), Federal Rules of Civil Procedure. R. Vol. II at 412-424.

At the same time they asserted contribution claims, petitioners filed affirmative defenses of "claim reduction," alleging that by virtue of the settlements the class had waived that portion of their claims fairly allocable to settling defendants. These defenses were stricken by the district court's order of May 30, 1979.

Petitioners' separate appeals dealing with the May 30, 1979 rulings were consolidated by the Fifth Circuit. The appellate court also granted defendant-respondents' motion to expedite briefing and oral agreement.

On October 30, 1979, the Fifth Circuit affirmed the district court's dismissal of contribution claims based upon its earlier opinion in *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F. 2d 897, *en banc rehng. denied*, 608 F. 2d 524 (5th Cir. 1979) (hereafter *"Abraham Construction"*). The

3. In addition to the absence of Southwest Forest and Interstate from Appendix A, Appendix D to the petition does not include these two unindicted companies' settlements, nor that of Consolidated Packaging Corporation ("Consolidated"), a felony indictee, since they were all executed after January 1979. Despite the absence of contribution (*cf.* Petition, at 4), Southwest Forest settled at approximately the same level (in dollars per market percentage point) at which the second unindicted company listed in Appendix D settled the litigation. At least in part because of financial considerations, Interstate and Consolidated settled at a level below most or all of the settlements in Appendix D.

court of appeals also held that the district court's decision on claim reduction was not appealable. Petitions for rehearing and suggestions for rehearing *en banc* were filed by two defendant-respondents, Weyerhaeuser Company and Willamette Industries, Inc., and by petitioners. Petitioners' motion to permit them to withdraw their rehearing petition was granted by the court this month. The two defendant-respondents' petition is still pending.

Both contribution claims and claim reduction defenses were again considered by the district court in December 1979. Pending contribution claims, filed after the district court's May 30, 1979 order by petitioners and two other defendants, one of which has settled and now itself faces contribution claims,[4] were dismissed with prejudice. Pretrial Order No. 31 (excerpted in Appendix A). The court found that the claim reduction defenses, which had been reasserted after the Fifth Circuit's ruling, were not ripe for decision, holding:

> First, non-settling defendants want the settling defendants' market shares removed from the claims remaining against them. This issue will be ripe for consideration if and when the case is submitted to a jury and at that time defendants may urge their position. At the moment, this objection to the settlements is untimely. Memorandum Opinion and Order, December 21, 1979, pp. 11-12 (excerpted at Appendix B).

Accordingly, petitioners still have available to them at the trial of the class actions in May 1980 the possibility of obtaining what they characterize as "contribution by way of the affirmative defense of claim reduction." Petition, at 6.[5]

---

4. Southwest Forest Industries, Inc. See footnote 1, supra.

5. Claim reduction is not contribution. Claim reduction exists in some form in all antitrust cases in which settlements have been reached with alleged coconspirators: a plaintiff's claim against the remaining defendants is always reduced in some amount by reason of settlements. On the other hand, contribution involves a separate cause of action which would be made available to entities found liable for antitrust violations, a new cause of action which would have a substantial impact upon the antitrust laws and antitrust litigation.

While the claim reduction issue is still viable in the district court, the petition seeks to have this Court reinstate the contribution claims. If these claims were allowed, the well-recognized purposes of settlement would be frustrated. Contrary to their understanding when the settlement agreements were executed, defendant-respondents would face additional liability in the settled cases and would be forced to shoulder once again the substantial burdens of litigation. Accordingly, several defendant-respondents have already notified the district court that they would seek rescission of their settlements if contribution were allowed. Denial of certiorari will end this threat to the settlements.

## REASONS FOR DENYING THE WRIT

Defendant-respondents respectfully submit that each of the following factors independently supports denial of the petition.

First, the petition should be denied in light of overwhelming precedent recognizing that Congress should determine whether contribution should be permitted in any area of law governed by statute.

Second, the petition should be denied because of pending Congressional antitrust legislation on contribution.

Finally, all but one of the many antitrust cases facing the issue have dismissed contribution claims. Even the lone exception involved only nondefendants, and should not permit contribution against settling defendants. This very limited conflict could be resolved in the near future without this Court's review, and therefore such review is unnecessary at this time.

### 1. Congress Is the Appropriate Forum for Determining Whether to Create a New Cause of Action for Contribution.

This Court and lower federal courts have held that Congress is far better suited to consider the wisdom of a cause of action for contribution in no way suggested by existing legislation. In

light of this well-established principle, the petition should be denied.

Petitioners have not contended and cannot contend that their claims are in any way recognized by the antitrust laws: there is no provision for contribution in any antitrust statute, the only persons having a cause of action under those statutes being those injured by antitrust violations. 15 U.S.C. §§ 16, 26 (1976). Accordingly, petitioners have attempted to substantiate their claims by arguing that policy considerations support creating a cause of action for contribution in antitrust cases. However, such contribution claims have been rejected in all but one of numerous cases decided to date on this issue.[6] Several of these cases, including the decision relied upon in this case, hold that Congress alone should decide whether a new cause of action for contribution is appropriate. This Court's precedent supports such deference.

---

6. Defendant-respondents are aware of the following cases which have decided this issue: *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1977-2 Trade Cas. ¶ 61,698 (D. Utah), *aff'd*, 1979-2 Trade Cas. ¶ 62,995, *en banc rehng. granted* (10th Cir., Dec. 27, 1979); *In re Beef Industry Antitrust Litigation*, M. D. L. No. 248 (N. D. Tex. Sept. 1, 1978) (Appendix C), *aff'd*, 1980-1 Trade Cas. ¶ 63,021, *en banc rehng. denied* (5th Cir. Dec. 21, 1979); *In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cas. ¶ 62,689 (S. D. Tex.), *aff'd per curiam*, No. 79-2439, *pet. for rehng. and suggestion for rehng. en banc pending* (5th Cir. 1979); *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, No. 75-2820 (E. D. La. 1977), *aff'd*, 604 F. 2d 897, *en banc rehng. denied*, 608 F. 2d 524 (5th Cir. 1979); *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 (1979), *en banc rehng. denied* (8th Cir. April 17, 1979); *In re Fine Paper Antitrust Litigation*, M. D. L. No. 323 (E. D. Pa. Aug. 3, 1979) (Appendix D); *Alabama* v. *Blue Bird Body Co.*, No. 75-23-N (M. D. Ala. June 22, 1979) (Appendix E), appeal docketed, No. 79-2667 (5th Cir. July 26, 1979); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cas. ¶ 62,717 (E. D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, 82 F. R. L. 647 (D. D. C. 1979); *El Camino Glass* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. ¶ 61,533 (N. D. Cal. 1976); *Labbee* v. *Wm. Wrigley & Co.*, No. 4029 (W. D. Wash. Dec. 20, 1974) (Appendix F); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S. D. N. Y. 1969).

Even in cases involving judge-made law, this Court has been reluctant to consider creating contribution rights without Congressional guidance. For example, in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952), this Court held:

> In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. . . . To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.
>
> We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. . . . We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. (342 U.S. at 285-86; footnotes omitted.)

This past June this Court determined to defer to Congress on another admiralty contribution matter because of existing legislation which would be affected by the requested ruling. *Edmonds* v. *Compagnie General Transatlantique*, 99 S. Ct. 2753, 2763, *rehng. denied*, 100 S. Ct. 194 (1979) (hereafter *"Edmonds"*).[7]

The policy considerations involved in granting contribution in admiralty negligence actions clearly differ from those in anti-

7. Petitioners attempted to discredit *Halcyon* in the district court by contending it was "repudiated" by *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106 (1974). R. Vol. II, p. 354. They softened their language in the appellate court by suggesting that *Halcyon* "was seriously undermined" by that case. Appellants' Brief at 32. Petitioners again cite this case in support of their request that this Court judicially imply a new cause of action for contribution. Petition, at 10-11. However, *Cooper Stevedoring* merely followed "the well-established maritime rule allowing contribution" (417 U. S. at 113), a rule which was traced back to "the 12th Century, and its roots no doubt go much deeper" (417 U. S. at 110). As *Edmonds* demonstrates, *Cooper Stevedoring* did not repudiate the *Halcyon* holding quoted above. 99 S. Ct. at 2763.

trust cases. But the principle of deferring to Congress announced in cases dealing with admiralty rules should apply much more forcefully to contribution proposals for purely statutory causes of action, such as those brought under the antitrust laws. Two of this Court's recent decisions relating to causes of action allowed by the antitrust laws support this principle, and lower court decisions have specifically held that such deference is required as far as contribution in antitrust cases is concerned.

In *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977) (hereafter *"Illinois Brick"*), this Court determined that substantial complications would be introduced in antitrust cases if indirect purchasers were permitted to sue, thereby diminishing the effectiveness of private antitrust lawsuits as a means of enforcing the antitrust laws. Such a cause of action, according to *Illinois Brick,* would not be permitted without Congressional approval. 431 U. S. at 734 n. 14 and 746. When this Court determined in *Illinois Brick* that even persons who may have been injured by reason of an alleged antitrust conspiracy have no cause of action under the antitrust laws in the absence of new legislation,[8] surely a new cause of action for those defendants which are found liable for purported antitrust violations should not be permitted without specific Congressional approval.

This Court also specifically deferred to Congress in *Reiter* v. *Sonotone Corp.,* 99 S. Ct. 2326 (1979) (hereafter *"Reiter"*), when faced with the question of whether a policy argument identical to one raised by petitioners was sufficient to preclude consumer causes of action under the provisions of § 4 of the Clayton Act (15 U. S. C. § 16 (1976)). In opposing such causes of action, certain parties argued that permitting consumers to sue under § 4 would have a deleterious effect on small businesses. Similarly, it is petitioners' position that a new cause of action for contribution is needed in part because small businesses must now either settle antitrust cases or risk being "driven

8. Cf. Transamerica Mortgage Advisors, Inc. v. Lewis, 48 U. S. L. W. 4001 (Nov. 13, 1979).

out of business" due to the adverse impact which the exposure they face in these cases has on their borrowing power. *See, e.g.*, Petition, at 13.[9] The Court responded to such policy arguments by referring them to Congress:

> Finally, respondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small business in particular and will ultimately be paid by consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed by Congress than to this Court. However accurate respondents' arguments may prove to be—and they are not without substance—they cannot govern our reading of the plain language in § 4. (99 S.Ct. at 2334.)

Both the Fifth and Tenth Circuits have echoed the philosophy of these precedents this past year. In *Abraham Construction,* 604 F. 2d 897, the Fifth Circuit rejected contribution on the merits and then recognized, in language reminiscent of this Court's recent pronouncement in *Reiter:*

> Those aggrieved by this decision always have recourse to Congress, a forum better suited to evaluation of the competing interests and policies involved. (604 F.2d at 906.).

The Fifth Circuit followed *Abraham Construction* in its decisions in this litigation and in *In re Beef Industry Antitrust Litigation,* 1980-1 Trade Cas. ¶ 63,021, *en banc rehng. denied* (5th Cir. Dec. 21, 1979).

---

9. Petitioners failed to mention that Mr. Kress, whose testimony was cited by petitioners in support of this argument, also stated during the Senate Committee hearings that the problems his company faced in this litigation would not be solved by the bill presently under consideration by Congress (which includes both claim reduction and contribution) because the potential exposure of the case, even if limited to the company's sales, would have forced settlement. Hearings on S. 1468 Before the Subcommittee on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 42-43 (1979) (statement of George F. Kress) (excerpted at Appendix G). See also Antitrust Equal Enforcement Act of 1979, S. 1468, 96th Cong., 1st Sess., Rept. No. 96-428 (Nov. 15, 1979) at 37 (hereafter "S. 1468 Rept."; excerpted at Appendix H).

Similarly rejecting contribution claims in antitrust cases on the merits, the Tenth Circuit's opinion in *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶ 62,995, *en banc rehng. granted* (10th Cir. Dec. 27, 1979) (hereafter *"Olson Farms"*), also directed those seeking contribution in antitrust cases to the Congressional forum:

> Before entering such a complex policy thicket, but recognizing a possible exception in the case of an unintentional violator, we believe this court should await a clear signal, at least, from the legislative branch of our government on the matter. Certainly, the Congress, assisted by the resources of the executive branch, is in a far superior and more appropriate position to gauge the impact on observance and enforcement of the antitrust laws from contribution and its various facets of implementation. In this regard, we consider it salutary that the overwhelming majority of states in which a right of contribution exists among joint tortfeasors have provided for such a right by statute. (1979-2 Trade Cas. at 79,704; footnote omitted.)

Other antitrust cases also have recognized that Congress should determine whether or not to develop a new rule permitting contribution. In one of the first reported decisions on the issue, for example, the court in *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339, 1345 (S. D. N. Y. 1969), held:

> Congress, aware of the rule against contribution, saw fit to provide for it explicitly in the securities statutes but not in the enforcement of antitrust laws which dominate so much of our litigation and . . . no such right should be implied.[10]

Only one case, decided by a divided panel, has specifically recognized a limited form of contribution in antitrust cases.

---

10. The securities laws permit contribution in sections which create a private cause of action. E.g., 15 U. S. C. §§ 77k(f), 78i(e), 78r(b). The absence of any such contribution provisions in the antitrust statutes has also been a factor in leading other antitrust courts to conclude that only Congress should create contribution rights for antitrust defendants. See Olson Farms, 1979-2 Trade Cas. at 79,701; Abraham Construction, 604 F. 2d at 903.

*Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179, *en banc rehng. denied*, (8th Cir. April 17, 1979) (hereafter *"Beauty Supply"*). *See* Part 3, at 12-15, *infra*. However, the opinion suggests that even the *Beauty Supply* majority may not have developed this limited contribution rule had it known that the issue would be before Congress merely a few months after its opinion was rendered. 594 F. 2d at 1184.

As the above cases held, Congress is the proper forum for determining whether contribution should be allowed in antitrust cases. It is respectfully submitted that to require briefing and oral argument on the merits of the petition in light of this precedent would not be a worthwhile expenditure of the time and resources available to this Court. The petition should therefore be denied.

**2. Since Congress Is Currently Considering the Merits of Contribution in Antitrust Cases, the Petition Should Be Denied.**

Legislation permitting contribution against nonsettling defendants and third parties in price-fixing cases, introduced in May 1979, was favorably reported out of committee and is now being considered on the floor of the United States Senate.[11] Any Court decision on contribution could therefore be of little or no long-term significance, and could conflict with a Congressional decision on this issue. For this reason alone, denial of the petition is justified.

Petitioners' requested cause of action deviates substantially from the one currently under consideration in Congress.[12]

---

11. S. 1468 Rept., at 3-5 (Appendix H at 2-6).

12. Petitioner Westvaco Corporation ("Westvaco") was a strong advocate of this legislation before the Senate Committee on the Judiciary. However, the bill reported out of Committee bears little resemblance to the form of contribution sought in this litigation by Westvaco and the other petitioners. The bill would apply only to future cases; petitioners advocate the application of the new cause of action to this litigation. The bill would apply only to price-fixing cases; petitioners apparently advocate a broad rule applicable to all

(Footnote continued on next page.)

Similarly, any other form of contribution considered by this Court could easily conflict in one or more substantive or procedural ways with the form of contribution, if any, which is enacted into law.[13] Even if contribution were created by this Court, the pendency of legislation in this area would still inevitably result in uncertainty in the courts and among parties in antitrust cases until Congress had also acted.[14] Defendant-respondents respectfully submit that to consider creating a new cause of action for contribution in the face of these uncertainties would be a waste of this Court's resources and contrary to clear judicial precedent which has held that courts should defer to Congress on such issues.

### 3. No Conflict Exists Between the Courts of Appeals Which Would Warrant Granting Certiorari at This Time.

The Eighth Circuit's *Beauty Supply* majority opinion is the only basis for finding that a conflict exists between the courts of appeals on the issue of contribution in antitrust cases. However, that one opinion does not create a conflict sufficient to warrant certiorari at this time, particularly because it created

---

(Footnote continued from preceding page.)
antitrust violations. The bill would specifically exempt defendants settling in good faith from contribution; petitioners seek contribution in the class action cases against the settling defendant-respondents.

13. The committee members presenting supplemental views on S. 1468 felt that price-fixing cases could be the very cases for which contribution should *not* be granted. See S. 1468 Rept., at 34-35 (Appendix H at 6-8). Potential variations in the substantive and procedural forms of contribution urged here and before Congress abound.

14. The opinions below recognized that any new cause of action for contribution should not be applied retroactively to these cases. In re Corrugated Container Antitrust Litigation, 1979-1 Trade Cas. ¶ 62,689 at 77,880 (S. D. Tex. 1979), aff'd per curiam, No. 79-2439 (5th Cir. Oct. 30, 1979). See Weinberg v. Mitchell, 588 F. 2d 275, 278 (9th Cir. 1978) (following Chevron Oil Co. v. Huson, 404 U. S. 97 (1971)).

only a restricted cause of action for contribution under limited circumstances. In addition, since the conflict may be further diminished or even resolved in the near future by reason of the pending legislation or the Eighth Circuit's modification or revocation of this limited cause of action, it should not be reviewed on the merits at this time.

*Beauty Supply* is the first and only decision which has permitted any form of contribution in antitrust cases. After analysis of such claims on the merits, not one other court has permitted such claims to withstand pretrial motions. Indeed, none of the cases recently decided in other circuits has followed this limited Eighth Circuit rule.[15] In *Abraham Construction* the Fifth Circuit expressly rejected this new contribution rule which permitted an antitrust defendant to sue an entity "not sued by the plaintiff in the main demand." 604 F. 2d at 900. In *Olson Farms* the Tenth Circuit affirmed the dismissal of contribution claims and refused to speculate as to whether "if the question were presented, Congress would include a right to contribution as part of the antitrust laws." 1979-2 Trade Cas. at 79,703. Even before the Fifth and Tenth Circuit decisions were announced, but after *Beauty Supply,* federal district courts in other circuits had also rejected contribution claims. *See* note 6, *supra.*

While a cause of action was created by the *Beauty Supply* majority, it did so in a § 2, Sherman Act case in which only one of two alleged conspirators was named a defendant. The nondefendant, as plaintiff's supplier, may have had "sufficient economic influence to preclude plaintiff from" suing it. 594 F. 2d at 1185. The court permitted the third-party contribution action to proceed against the nondefendant. This cause of action has been interpreted by courts outside the Eighth Circuit to apply only to nondefendants. *See, e.g., Abraham Construc-*

15. *Heizer Corp.* v. *Ross,* 601 F. 2d 330, 331 (7th Cir. 1979), a securities case, merely cited *Beauty Supply* for a general policy proposition, and does not indicate that the Seventh Circuit would permit contribution in antitrust cases. See also note 10, supra.

*tion*, 604 F. 2d at 900; *In re Fine Paper Antitrust Litigation*, MDL No. 323 (E. D. Pa. Aug. 3, 1979), at 3 (Appendix B).[16] Because all defendant-respondents were named as defendants in plaintiffs' cases, these recent court interpretations would completely defeat petitioners' cross-claims.

In addition, the *Beauty Supply* majority, responding to claims that contribution would inhibit settlements, stated that a rule protecting settling defendants could be fashioned. 594 F. 2d at 1184. Each of the authorities cited in *Beauty Supply* to support this proposition would prohibit contribution against settling defendants. Several recent cases have interpreted the *Beauty Supply* decision to prohibit contribution against settling defendants. *Alabama* v. *Blue Bird Body Co.*, No. 75-23-N (M. D. Ala. June 22, 1979), *appeal docketed*, No. 79-2667 (5th Cir. July 26, 1979) (Appendix E); *In re Fine Paper Antitrust Litigation*, MDL No. 323 (E. D. Pa. Aug. 3, 1979), at 3 (Appendix D). Thus, even if *Beauty Supply* were also applied to defendants in antitrust cases, it would not apply to settled claims in this or any other litigation.

The Eighth Circuit rule was developed in part because that court felt no Congressional action on contribution in antitrust cases was likely. 594 F. 2d at 1183-84. Whether the Eighth Circuit will change its rule once again by reason of the pending legislation is uncertain. However, it is likely that the Eighth Circuit will further consider its contribution opinion in the near future.[17] The existence of pending legislation on contribu-

16. This view is consistent with many statements in the opinion. For example, the *Beauty Supply* court emphasized throughout its opinion that its decision to permit contribution was being undertaken "so that other violators will not escape liability" (594 F. 2d at 1185) and because the antitrust laws are undermined when "a significant number of antitrust violators . . . escape liability for their wrongdoing" (594 F. 2d at 1185). Defendants in antitrust cases obviously do not escape liability unless they prove their innocence at trial or through pretrial motions to dismiss or for summary judgment.

17. For example, we are informed that the court in *Little Rock School Dist.* v. *Borden, Inc.*, 1980-1 Trade Cases ¶ 63,059 (E. D. Ark. 1979), will soon consider 28 U. S. C. § 1292(b) certification of at least some issues arising from application of the Eighth Circuit's contribution rule in that case.

tion may convince that court to retract or modify its opinion so that the conflict with the other circuits is either eliminated or reduced.

As the only case decided to date which has created a cause of action for contribution, *Beauty Supply* does not demonstrate a dramatic schism between the courts of appeals on this issue. The conflict between *Beauty Supply* and the other decisions is also insubstantial because of the limited nature of the Eighth Circuit contribution rule. Thus, defendant-respondents respectfully submit that the restricted cause of action created by the Eighth Circuit does not represent a conflict which requires review, particularly at this time.

## CONCLUSION

Defendant-respondents respectfully suggest that, in accordance with precedent, Congress is the proper forum for deciding whether to permit contribution in antitrust cases. For this Court to review the merits of changing the no contribution rule would be particularly inappropriate at this time, since Congress is studying legislative proposals on the issue and any changes made to the rule could be of little or no long-term effect. In addition, the limited conflict between the circuits does not warrant granting the petition, particularly under these circumstances.

Petitioners' contribution claims have been pending in federal courts for over a year. Denial of certiorari would finally end the uncertainty and litigation over this issue which has threatened much of the $300 million in settlements reached in MDL-310. At the same time, petitioners still have claim reduction defenses in the trial court which, if allowed, would achieve the same result they are seeking through their contribution claims. Accordingly, defendant-respondents respectfully submit that the petition should be denied forthwith.

Dated: January 21, 1980.

Respectfully submitted,

R. CLIFFORD POTTER
BELL, BOYD, LLOYD, HADDAD & BURNS
135 South LaSalle Street
Chicago, Illinois 60603
(312) 372-1121

*Counsel for* Boise Cascade Corporation *and Also on Behalf of the Following Defendant-Respondents:*

The Chesapeake Corporation of Virginia
Consolidated Packaging Corporation
Container Corporation of America
The Continental Group, Inc.
Diamond International Corporation
Dura-Containers, Inc.
Green Bay Packaging, Inc.
Inland Container Corporation
International Paper Company
Interstate Container Corporation
Longview Fibre Company
MacMillan Bloedel, Inc.
MacMillan Bloedel Containers, Inc.
Olinkraft, Inc.
Owens-Illinois, Inc.
St. Joe Paper Company
St. Regis Paper Company
Union Camp Corporation
U. S. Corrugated Fibre-Box Company

# Appendices

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Texas
Houston Division

| | |
|---|---|
| In re Corrugated Container Antitrust Litigation<br>This Document Relates to All Actions Except:<br>Franklin Container Corp., et al., (C. A. H-78-671) | M.D.L. No. 310 |

PRETRIAL ORDER No. 31.

A pretrial conference and settlement hearing was held before the court on December 3 and 4, 1979, to decide whether certain proposed settlements herein should be finally approved, and other matters. The court having studied the various motions, objections, briefs, memoranda, and argument on these issues, makes the following order:

[¶¶ 1-2 omitted]

3. In light of this court's and the Fifth Circuit's holding that there is no right of contribution in these antitrust cases, it is hereby ODERED that

a. Defendant the Mead Corporation's complaint attempting to assert a right of contribution in these cases is hereby dismissed with prejudice;

b. All other contribution claims and cross-claims still pending in this litigation are hereby dismissed with prejudice.

4. For the reasons set forth in the attached Memorandum Opinion, which is incorporated herein by reference, the motion

of class representatives for final approval of settlements with the following defendants is GRANTED: Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, Union Camp, Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc. All objections to these settlements are OVERRULED.

[¶¶ 5-11 omitted]

DONE and ENTERED this 21st day of December, 1979, in Houston, Texas.

/s/ John V. Singleton
*United States District Court*

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Texas
Houston Division

| | |
|---|---|
| In re Corrugated Container Antitrust Litigation<br><br>This Document Relates to All Actions Except Civil Actions H-79-87, H-78-2004, H-78-1226, H-78-6718, H-78-1263, H-78-1452, H-78-376, H-78-1815, H-77-2158, H-78-4, H-79-1044, H-79-1086. | M.D.L. No. 310 |

MEMORANDUM OPINION AND ORDER.

Before the court is class plaintiffs' motion for final approval of settlements with twenty-seven defendants[1] in this massive antitrust litigation, in which members of the corrugated industry are alleged to have fixed prices in violation of the Sherman and Clayton Acts. These cases were consolidated in this court for pretrial purposes pursuant to 28 U. S. C. § 1407 in late 1977. [. . .]

---

1. The settling defendants are: Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, Union Camp, Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc. Nonsettling defendants remaining in the class action case are: Alton Box

(Footnote continued on next page.)

[Pages 2-10 omitted]

## THE OBJECTIONS OF DEFENDANTS

[. . .]

Non-settling defendants have raised three objections to approval of the settlements. Their standing to object is questionable. *In re Beef Industry Antitrust Litigation* (November 26, 603 F. 2d 1367, 1372-73 (5th Cir. 1979). The court has considered them on the merits, however, for the third time.[14] First, non-settling defendants want the settling defendants' market shares removed from the claims remaining against them. This issue will be ripe for consideration if and when the case is submitted to a jury, and at that time defendants may urge their position. At the moment, this objection to the settlements is untimely.

[. . .]

[pages 13-15 omitted]

Done this 21st day of December, 1979, in Houston, Texas.

/s/ John V. Singleton
*United States District Judge*

---

(Footnote continued from preceding page.)
Board Co., Crown-Zellerbach Corp., Fibreboard Corp., The Fibre Box Assn., Georgia-Pacific Corp., Mead Corp., Packaging Corp. of America, Potlatch Corp., Westvaco Corp.; Southwest Forest Industries has reached a settlement agreement which has not yet been submitted to the class.

UNITED STATES DISTRICT COURT
Northern District of Texas
Dallas Division

| | |
|---|---|
| In Re:<br>Beef Industry Antitrust Litigation | M. D. L. Docket<br>No. 248 |
| Meat Price Investigators Association, et al.,<br>*Plaintiffs,*<br>*vs.*<br>Iowa Beef Processors, Inc., et al.,<br>*Defendants.* | CA 3 77-0780-C |
| Darrell Cameron, et al.,<br>*Plaintiffs,*<br>*vs.*<br>Iowa Beef Processors, Inc.,<br>*Defendants.* | CA 77-0990-C |
| Don Ludvigson, et al.,<br>*Plaintiffs,*<br>*vs.*<br>Iowa Beef Processors, Inc., et al.,<br>*Defendants.* | CA 3 77-1080-C |

## ORDER DENYING MOTION OF DEFENDANT IOWA BEEF PROCESSORS, INC. TO AMEND ANSWER TO ASSERT CROSSCLAIM

The above matter came on for consideration before this Court pursuant to the motion of defendant Iowa Beef Processors, Inc. to amend its Answer in order to assert a crossclaim for contribution against defendant Spencer Foods, Inc. The Court has received and duly considered the Memorandum filed in support of said defendant's Motion, the Memorandum of defendant Spencer Foods, Inc., in opposition to the Motion, and the Iowa Beef Processors, Inc., Reply Brief in support of the Motion to Amend.

Upon the memoranda of law, and upon this Court's determination that no right of contribution exists under the Federal antitrust laws, and upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED, that the Motion of defendant Iowa Beef Processors, Inc., to amend its Answer to assert a crossclaim against defendant Spencer Foods, Inc., is hereby denied.

ODERED this 1st day of September, 1978.

/s/ William M. Taylor
William M. Taylor
*Judge of United States District Court*

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

| | |
|---|---|
| In Re: Fine Paper Antitrust Litigation<br>This Document Relates to:<br>All Actions | MDL 323 |

MEMORANDUM

McGlynn, *J.* August 3rd, 1979

Six of the defendants in this multidistrict antitrust litigation have entered into proposed settlement agreements with the plaintiff classes.[1] Pursuant to Rule 15(a), Fed. R. Civ. P., this court granted leave to a number of defendants to amend their answers asserting cross-claims for contribution against settling defendants and other defendants. Mead Corporation filed no cross-claim. Rather, on March 10, 1979, Mead instituted a separate action against its co-defendants in the MDL No. 323 actions.[2] In addition, Mead amended its answers in the remaining MDL No. 323 cases, to assert the additional defense that if the tentative settlements between the class plaintiffs and certain other defendants are finally approved by the court, any judgment which may be entered in favor of the classes must be reduced by an amount fairly reflecting any damage inflicted on class members by the settling defendants.

The settling defendants now move to dismiss Mead's claim other cross-claims asserted against them.

---

1. The settling defendants are as follows: Boise Cascade Corp., International Paper Co., Potlach Corp., St. Regis Paper Co., Union Camp Corp. and Weyerhaeuser Co.

2. *The Mead Corporation* v. *Boise Cascade Corporation, et al.*, C. A. 79-1022.

The positions asserted by the settling defendants diverge. Four[3] of the six argue that (1) there is no contribution in antitrust cases, and (2) there is no right of contribution against a settling defendant.[4] A fifth settling defendant (Potlach Corp.) filed a separate memorandum arguing for a right of contribution in antitrust cases except against settling defendants.[5] The sixth settling defendant (Weyerhaeuser), in its May 8, 1979 memorandum, also argues that there should be such a right of contribution in antitrust cases, including a right to contribution against settling defendants, but takes the position that this court should implement that right indirectly by crediting nonsettling defendants with an amount insufficient to insure that they will not be held liable for a disproportionate share of any judgment.

For the most part, contribution has not been permitted among antitrust defendants. *In re: Ampicillin Antitrust Litigation,* MDL Docket No. 50 (D. D. C., filed May 30, 1979); *El Camino Glass* v. *Sugglo Glass Co.,* 1977-1 Trade Cases ¶ 61,533 (N. D. Cal. 1976); *Sabre Shipping Corp.* v. *American Lines, Ltd.,* 298 F. Supp. 1339 (S. D. N. Y. 1969). My research discloses only one appellate decision dealing with the issue. In *Professional Beauty Supply Co.* v. *National Beauty Supply Co.,* 594 F. 2d 1179 (8th Cir. 1979), the court marshalled all the arguments, analyzed them and came down on the side of allowing contribution in antitrust cases "under certain circumstances". 594 F. 2d at 1182. The circumstances of that case are substantially different from those presented here.

The actions presently before this court involve allegations of an industry wide conspiracy in which 15 corporations located

3. Boise Cascade, International Paper, St. Regis and Union Camp.

4. See Memorandum of Certain Settling Defendants in Support of Motion to Dismiss Claims for Contribution, (filed April 9, 1979).

5. See Memorandum by Potlach Corporation (filed April 9, 1979).

throughout the country are defendants in more than 46 separate law suits. The plaintiffs include a nationwide class of private parties, six state entity classes and eleven individual state plaintiffs. In contrast, only one plaintiff and one defendant were involved in *Professional Beauty Supply*, and there the court concluded that considerations of fairness dictate that the entire burden not be placed on one or two tortfeasors "because of the plaintiff's whim or spite or his collusion with the other wrongdoer". 594 F. 2d at 1185. The court reasoned that allowing contribution served the deterrant objectives of the antitrust laws by preventing one of two tortfeasors from escaping liability altogether. This rationale is inapplicable here since there is no suggestion that there are putative tortfeasors who are not now parties to this action.

Indeed, the settling defendants are not about to escape liability but to the contrary, have already contributed to a fund for the benefit of the plaintiffs.

If the moving parties were successful in this manuever to hold in the settling defendants, the uncertainty of their ultimate exposure would require their continued participation in this litigation, thus depriving them of one of the most important benefits of an early compromise. Of course, it would also inhibit further settlements from among the remaining defendants.

Significantly, the court in *Professional Beauty Supply* specifically excluded settling defendants from the scope of its ruling. 594 F. 2d at 1184.

Finally, the requirement that the court approve class action settlements is a sufficient safeguard against the use of economic power by one tortfeasor to obtain settlement terms which cannot be otherwise supported.

I am convinced that this is not a case for the imposition of a rule of contribution. Fairness in this case requires that those

defendants who want to limit their exposure and avoid further expense ought to be permitted to do so.

Accordingly, the motions of the settling defendants to dismiss the claims for contribution will be granted.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

In Re: Fine Paper Antitrust Litigation
This Documents Relates to:
All Actions
} MDL 323

PRETRIAL ORDER NO. 60

AND NOW, this 3rd day of August, 1979, it is hereby

ORDERED that the motions of the settling defendants to dismiss the claims for contribution be and the same are hereby Granted.

By the Court:

/s/ Joseph L. McGlynn, Jr.
*Joseph L. McGlynn, Jr. J.*

IN THE UNITED STATES DISTRICT COURT
The Middle District of Alabama
Northern Division

State of Alabama; et al,
*Plaintiffs,*
*vs.*
Blue Bird Body Company; et al,
*Defendants.*

Civil Action
No. 75-23-N

## ORDER

This cause is presently submitted to the Court after oral argument on motion filed herein March 16, 1979, by Defendants, Blue Bird Body Company, Blue Bird Mid-South, Inc., Eddins Bus Sales, Inc., Thomas Built Buses, Inc., and Everett Equipment Company (hereinafter Cross-Claim Defendants), to dismiss the cross-claim seeking contribution filed herein March 9, 1979, by Defendants, Ward School Bus Manufacturing, Inc., Carpenter Body Works, Inc., Wayne Corporation and Sheller Globe Corporation (hereinafter Cross-Claimants). For the reasons stated below, this Court is of the opinion that said motion to dismiss the cross-claim should be granted and the cross-claim dismissed for failure to state a claim upon which relief can be granted.

This action was filed by a class of school bus purchasers on January 24, 1975, seeking treble damages from certain school bus manufacturers and distributors for alleged violations of federal antitrust laws. This Court originally certified both a nationwide class and a State-wide class of purchasers as Plaintiffs. The

United States Court of Appeals for the Fifth Circuit, after an interlocutory appeal had been taken, held that this action should proceed with a State-wide class but not a nation-wide class. By Order of October 23, 1978, this Court permitted the action to continue with a State-wide Plaintiff class. The Court approved a notice to potential class members on December 8, 1978, which was supplemented by Order of March 19, 1979, to include information concerning a proposed settlement between the Plaintiff class and certain of the Defendants. A hearing is set on June 11, 1979, for approval or disapproval of the settlement.

It has been suggested by Cross-Claimants that this Court withhold ruling on Cross-Claim Defendants' motion to dismiss pending the outcome of *In re: Beef Industry Antitrust Litigation —Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, (N. D. Tex. 1978), now pending before the United States Court of Appeals for the Fifth Circuit. Ordinarily, this Court would be inclined to follow such a suggestion, but in this case, the Court feels withholding ruling would cause the parties considerable additional expense by the necessity of further notice to potential class members and postponement of the hearing on approval of the partial settlement presently set for June 11, 1979. No such additional notice will be required if the Court of Appeals for the Fifth Circuit rules there is no right to contribution under federal antitrust law. If, on the other hand, that Court, pending this suit, recognizes a right to contribution applicable to this proceeding, corrective measures may then be taken in this cause with little unnecessary and additional expense. Consequently, this Court feels an immediate ruling on the motion before it will benefit all parties.

Since the issue before the Court arises on motion to dismiss, the facts alleged in the cross-claim must be accepted as true and the cross-claim dismissed only if it appears Cross-Claimants can prove no set of facts which would entitle them to relief.

*Conley* v. *Gibson*, 355 U. S. 41 (1957); *Hines* v. *Delta Airlines, Inc.*, 461 F. 2d 576 (5th Cir. 1972).

It appears that federal law governs the issue of the availability of contribution under federal antitrust law. *El Camino Glass* v. *Sunglo Glass Co.*, [1977-1] Trade Reg. Rep. (CCH) ¶ 61,533 (N. D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Inc.*, 298 F. Supp. 1339 (S. D. N. Y. 1969); see, *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173 (1942). The general rule under federal common law is that contribution is not available against joint tortfeasors. *Edwards* v. *E. I. DuPont de Nemours & Co.*, 183 F. 2d 165 (5th Cir. 1950); *Central Surety & Ins. Corp.* v. *Mississippi Export R. R. Co.*, 91 F. 2d 125 (5th Cir. 1937). Until recently, all the federal courts which had considered the issue had unanimously held that there is no right to contribution under federal antitrust law. *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, [1977-2] Trade Reg. Rep. (CCH) ¶ 61,698 (D. Utah 1977); *Wilson P. Abraham Construction Co.* v. *Texas Indus., Inc.*, No. 75-2820 (E. D. La. 1977); *El Camino Glass* v. *Sunglo Glass Co.*, supra; *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, supra. In a very recent decision, the United States Court of Appeals for the Eighth Circuit reversed the district court's dismissal of a third-party complaint seeking contribution and held that sound policy reasons dictate a rule which would allow contribution from joint tortfeasors in federal antitrust cases. See, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, [1979-1] Trade Reg. Rep. (CCH), ¶ 62,485 (8th Cir. 1979). That Court said, however: "[T]he problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case." That is specifically the problem which the Court faces in the instant case and may be the "Achilles heel" of that decision.

The Court in *National Beauty Supply* discussed several policy considerations which lead to its conclusion that contribution is

appropriate. "The deciding factor in our decision is fairness between the parties." *National Beauty Supply, supra,* at 76,849. In that case, the defendant attempted to bring into the suit by way of a third-party complaint a party with whom the defendant had allegedly conspired to violate federal antitrust law. The Court concluded that it would be fundamentally unfair to allow one alleged conspirator to bear the entire burden of a loss for which two parties are responsible.

In the opinion of this Court, the question of fairness must be viewed in quite a different light where, as in the instant case, all alleged co-conspirators have been made parties and certain Defendants have entered into a good faith settlement. It should be noted that the same settlement offer which certain Defendants have accepted has been made to all the Defendants, so that it cannot be argued that there has been any collusion between the Plaintiffs and any Defendants.

It is argued by the Cross-Claimants that recognition of a right to contribution would act to deter violations of the antitrust laws. "To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing." *National Beauty Supply, supra,* at 76,849.[1] On the other hand, a contrary argument may logically be made. In antitrust actions where the litigation is almost certain to be complicated, expensive and lengthy, encouraging such settlements puts the plaintiff in a much better position to recover damages against at least some defendants and thereby finance continued litigation against the remaining defendants. Allowing contribution would discourage such settlements and make it much more difficult for the

1. In the instant case, the Court is not faced with a situation where an alleged violator is escaping "all responsibility for its wrongdoing" but is faced with a situation where certain Defendants have entered a good faith settlement with the Plaintiffs and have agreed to compensate the Plaintiffs for their alleged violations.

plaintiff to ultimately prevail. The more difficulty the plaintiff faces, the less likely such suits will be brought, the less likely plaintiffs will succeed, and the less likely would-be violators will be deterred.

It seems significant to this Court that it is the Plaintiffs who have been allegedly damaged by antitrust violations, so that the sensible rule is to let them determine which Defendants to attempt to recover against. The possibility of being singled out for the full burden of a treble damages recovery would seem a much greater deterrent to a potential violator than the knowledge that any damages assessed would be shared with all other violators through contribution. Acordingly, it is

ORDERED by this Court that the Cross-Claim Defendants' motion to dismiss be, and the same is hereby, granted, and the cross-claim hereby dismissed.

DONE this 18th day of May, 1979.

/s/ R. E. Varner
*United States District Judge*

F-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JACK LABBEE; et al,
*Plaintiffs,*

*vs.*

WM. WRIGLEY, JR. COMPANY, et al,
*Defendants.*

No. 4029

ORDER DENYING DEFENDANTS' MOTIONS FOR LEAVE TO FILE CROSS CLAIMS.

Defendants Wrigley, Life Savers, Colgate-Palmolive, Warner-Lambert and Todd have each filed a motion for leave to file cross claims against defendant Proctor and Gamble. All movants seek the equitable remedy of contribution for a prorata share of any damages which the movants may ultimately be compelled to pay in this action, and some movants also seek contribution for a prorata share of the costs that may be awarded and attorney's fees incurred in defending this litigation.

The Court has read and fully considered the written memoranda submitted by counsel for all parties, and has concluded that defendants' motions should be denied on the rationale and ruling of the Court in *Sabre Shipping Corp.* v. *American President Lines Ltd.*, 298 F. Supp. 1339 (S. D. N. Y. 1969). In that decision it is held that an antitrust defendant, who is or may be found liable in damages, cannot recover contribution from a co-defendant, who is or might have been held a joint tortfeasor, when the claims against the latter defendant have been settled and plaintiff has executed a covenant not to sue said defendant.

The Court has also determined that no useful purpose would be served by the formality of granting leave to file the cross claims

and then dismissing them for failure to state a claim upon which relief can be granted. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all of the several motions by various defendants seeking leave to file cross claims are denied.

IT IS SO ORDERED this 20th day of December, 1974.

/s/ George H. Boldt
*Sr. United States District Judge*

G-1

# ANTITRUST EQUAL ENFORCEMENT ACT OF 1979, S. 1468

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
ANTITRUST, MONOPOLY AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SIXTH CONGRESS

FIRST SESSION

ON

**S. 1468**

---

JUNE 8 AND 12, 1979

---

**Serial No. 96-27**

---

Printed for the use of the Committee on the Judiciary

[Pages II-41 omitted]

[. . .]

Senator BAUCUS. Thank you.

One quick question, Mr. Kress. If this amendment has been in effect since 1914, would it have addressed the problems you were faced with? Would you have had any of the problems that you are addressing here today?

Mr. KRESS. I feel it is good legislation and I am supporting it. Though it would not solve my problem, it is a step in the right direction.

Senator BAUCUS. Why would it not solve your problem?

Mr. KRESS. Because my liability would still be $75 million to $80 million, so I would be faced with a decision. My creditors would be off my back. I wouldn't have to worry about them. But the family eggs would all be put out on what the jury might do. I am afraid if I were faced with that, I would still have to settle.

Senator BAUCUS. Thank you very much. Thank you, Mr. Chairman.

[. . .]

[Pages 44-237 omitted]

Calendar No. 456

96TH CONGRESS
*1st Session*

SENATE

REPORT
No. 96-428

# ANTITRUST EQUAL ENFORCEMENT ACT OF 1979

---

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 1468

together with

SUPPLEMENTAL VIEWS

November 27 (legislative day, November 15), 1979.—
Ordered to be printed

---

U. S. Government Printing Office
Washington : 1979

Calendar No. 456

96TH CONGRESS
*1st Session*

SENATE

REPORT
No. 96-428

# ANTITRUST EQUAL ENFORCEMENT ACT OF 1979

November 27 (legislative day, November 15), 1979.—
Ordered to be printed

MR. BAYH, from the Committee on the Judiciary, submitted the following

## REPORT

together with

## SUPPLEMENTAL VIEWS

[To accompany S. 1468]

The Committee on the Judiciary, to which was referred the bill (S. 1468) to provide for contribution with respect to damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act, having considered the same, reports favorably thereon, and recommends that the bill do pass. [. . .]

[page 2 omitted]

[. . .]

## II. TEXT OF SENATE BILL 1468

The text of S. 1468 is as follows:

A BILL To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Clayton Act (15 U. S. C. 12 et seq.) is amended by inserting after section 4H the following new section:

"SEC. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

"(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

"(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith,

relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

"(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

"(e) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.".

## III. Summary of Reported Bill

S. 1468 adds a new section 4I. to the Clayton Act. Subsection (a) provides that any parties subject to liability as defendants in antitrust price-fixing cases under sections 4, 4A or 4C of the Clayton Act may claim contribution from their co-conspirators. The formula for computing each defendant's share of the liability of damages is based upon the sales or purchases of goods or services of such defendant. The liability is therefore based on an assessment of the damages attributable to each defendant's specific relative benefit from the price-fixed sales weighted by the amount of the overcharge as reflected in its individual sales or purchases. Subsection (a) makes clear that a defendant in a price-fixing suit may use the procedural tools of the Federal Rules of Civil Procedure to effectuate its right of contribution in asserting a cross-claim, counterclaim, third party claim or by a separate action, whether or not any other party has brought an action for contribution in the suit. The intent is to retain the policies of both Rule 14(a) of the Federal Rules of Civil Procedure, which encourages joinder of claims and parties in one proceeding, and Rule 42(b), which permits the court to order

separate trials on the contribution issue to avoid undue prejudice to a plaintiff.

Subsection (b) describes the "carve-out" formula by which the court relieves nonsettling defendants of the liability attributable to the sales or purchases of the defendants who settle. In order to effectuate the goal of equitable distribution of the liability among the alleged co-conspirators, the court is instructed to subtract from the claims of the releasor against the nonsettling defendants the greatest of the following three sums: (1) any amount stipulated by the release or covenant given; or (2) the amount of consideration paid for the release or covenant; or (3) treble the actual damages attributable to the settling defendants' sales or purchases of goods or services. This provision also specifies that in single damage cases by the U. S. Government under section 4A, the amount "carved-out" under item 3 above is not trebled.

Subsection (c) provides that a defendant who settles is protected against any liability for contribution with respect to the damage claims of the plaintiffs with whom such defendant settles. This protection becomes effective as soon as the settlement agreement is entered into, but the protection lapses if the agreement is not finally consummated. Subsections (b) and (c) thus provide together that a settling party is not subject to claims for contribution from nonsettling parties and that nonsettling parties are not liable for damages attributable to the settling parties.

Subsection (d) emphasizes that the principles of joint and several liability continue to apply to price-fixing suits. That is to say, the plaintiffs' burdens are not increased. They need still sue only one defendant and collect damages attributable to all (although, of course, that defendant has a claim against the other defendants for contribution). Moreover, the fact that one defendant is insolvent or outside the jurisdiction of the court

does not impair the plaintiffs' rights, although it may adversely affect the defendants' ability to obtain contribution.

Subsection (e) provides that application of this Act will be prospective from the date of enactment. [. . .]

[Pages 6-27 omitted]

SUPPLEMENTAL VIEWS OF SENATORS METZENBAUM AND KENNEDY ON S. 1468.

[Pages 28-33 omitted]

[. . .]

A primary duty of the President's Antitrust Commission was to recommend changes in existing law and procedure which would streamline antitrust litigation. The Antitrust Commission's recommendations for legislative change have been incorporated in S. 390, the Antitrust Procedural Improvements Act of 1979, which passed the Senate on July 20, 1979. The beneficial effect of S. 390 and like measures designed to speed up antitrust litigation would probably be wiped out in price-fixing cases if S. 1468 becomes law.

B. REASONS ADVANCED FOR S. 1468 DO NOT SUPPORT CONTIBUTION IN PRICE-FIXING CASES

The supporters of S. 1468 argue that contribution will distribute liability "more fairly" among price-fixers. This assumes, of course, that some price fixers escape suit by their victims and the subsequent judgment or settlement payment, an assumption that is not borne out by experience. For example, in the *Corrugated Container* case—the case that appears to have spurred the considerable interest in S. 1468—37 defendants are involved. In practice, therefore, if a price-fixing conspiracy is detected, it is usual for all of the participants to be joined as defendants in the private antitrust suits. *See e.g., In re Fine Paper Antitrust Litigation,* M. D. L. No. 323, slip op. at 3 (E. D. Pa. Aug. 3,

1979); *Alabama* v. *Bluebird Body Co.*, No. 75-23-N, slip op. at 4 (M. D. Ala. May 18, 1979).

The supporters of S. 1468 argue further that when deciding whether to join a conspiracy, a potential price-fixer factors into its decision-making calculus the possibility that it may escape liability because of the absence of contribution. While this argument is not completely without merit, it is doubtful that businessmen, who are generally risk averse, would give significant weight to the possibility of escaping damage liability for price-fixing when the downside risk of liability for treble the injury caused by all of the conspirators is so substantial. As one court observed, "[t]he possibility of being singled out for the full burden of a treble damage recovery would seem a much greater deterrent to a potential violator than the knowledge that any damages assessed would be shared with all other violators through contribution." *Alabama* v. *Bluebird Body Co.*, No. 75-23-N, slip op. at 5 (M. D. Ala. May 18, 1979).

### C. Contribution Is More Likely to Be Appropriate in Antitrust Cases Not Involving Price-Fixing: the Professional Beauty Supply Case.

Nonetheless, there are antitrust cases which may call for contribution. *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir., 1979), is one. In this case, the plaintiff, a wholesaler of beatuy supplies, sued a competing wholesaler for conspiring to monopolize under Section 2 of the Sherman Act. The plaintiff claimed that the defendant had caused a manufacturer of beauty supplies, the alleged co-conspirator, to terminate the plaintiff as one of the manufacturer's wholesalers. The court of appeals declined to follow the previous decisions automatically denying contribution in all antitrust cases. Instead, it directed the district court to determine whether

equitable considerations dictated allowing the defendant wholesaler to obtain contribution from the manufacturer.

In a situation like *Professional Beauty Supply*, allowing contribution may well shift liability to a person who is, in fact, primarily resonsible for plaintiff's antitrust injury. For example, the manufacturer, who was not joined as a defendant in *Professional Beauty Supply*, may have been the dominant party in the conspiracy to terminate the plaintiff as a wholesaler. Unlike the typical price-fixing case, there are serious questions of relative culpability in many other types of cases under the antitrust laws. [. . .]

## B. The Need for Mandatory Claim Reduction Has Not Been Demonstrated

[. . .]

Only one witness representing a small company appeared at the hearings on the legislation, George F. Kress, Chairman of the Board of Green Bay Packaging Inc. Green Bay is a defendant which has settled in the *Corrugated Container* case. Twenty-three of the 37 defendants in that case have settled for a total amount approaching $300 million. The district court has preliminarily approved all of the settlements in the case. *In Re Corrugated Container Antitrust Litigation*, M. D. L. No. 310 (S. D. Tex., May 30, 1979) (slip opinion).

Mr. Kress believed he was forced to settle because of earlier settlements by defendants with larger market shares than Green Bay. But it seems clear from his testimony that his company's decision would not have been affected by the availability of contribution or mandatory claim reduction. Indeed, when asked by Senator Baucus whether mandatory claim reduction would

have solved his company's problem, Mr. Kress admitted that it would not have. (June 8, 1979 Tr. at 76) Because the *Corrugated Container* case was a class action with a potential treble damage award, Green Bay would have made the same business decision to settle even if S. 1468 had been law.

In fact, Green Bay made no efforts to settle before class action certification by the court in the *Corrugated Container* case. The potential liability of the defendants became much greater after class action certification. As a result, the plaintiffs demanded and received more in settlement from defendants like Green Bay, who did not reach agreement until after class action certification, than from those who reached agreement before certification. Perhaps most importantly, Green Bay was hardly pushed to the wall by plaintiffs' settlement demands. The settlement amount—in after-tax dollars—was much less than one-third of its after-tax income for one year.

[. . .]

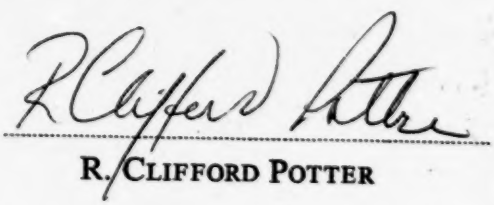
[Pages 38-41 omitted]

[. . .]

HOWARD M. METZENBAUM
EDWARD M. KENNEDY

## CERTIFICATE OF SERVICE

The undersigned counsel of record for defendant-respondent Boise Cascade Corporation hereby certifies that on January 21, 1980, three (3) copies of this Brief In Opposition To Petition For Writ of Certiorari To United States Court of Appeals For The Fifth Circuit, filed this day on behalf of certain defendant-respondents in this matter, were placed in the United States Mail, properly addressed to counsel of record for each party separately represented herein and first class or air mail postage prepaid, in compliance with Rules 33.1 and 33.3(b) of the Rules of Practice of the Supreme Court of the United States.



R. CLIFFORD POTTER